

Honorable Robert S. Lasnik

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

THE SIGN POST, INC., a Washington
corporation,

Plaintiff,

vs.

BOB'S BURGER AND BREW OF
WASHINGTON, LLC, a Washington limited
liability company; RICK KILDALL; and BOB
KILDALL,

Defendants.

NO. CV09-1420 RSL

DEFENDANTS CODY HULBUT AND
B3 BIRCH BAY, LLC'S ANSWER TO
PLAINTIFF'S FIRST AMENDED
COMPLAINT FOR COPYRIGHT
INFRINGEMENT

Defendants Cody Hulburt and B3 Birch Bay, LLC (collectively "Birch Bay Bob's"), by
way of answer to Plaintiff's First Amended Complaint for Copyright Infringement, admit, deny
and allege as follows:

I. NATURE OF CASE

1.1 Birch Bay Bob's admits that plaintiff seeks recovery for alleged copyright
infringement.

1.2 Birch Bay Bob's admits that plaintiff manufactures and installs signs. Birch Bay
Bob's denies each and every remaining allegation contained in paragraph 1.2.

II. JURISDICTION AND VENUE

2 Answering paragraphs 2.1 through 2.3, Birch Bay Bob's admits that jurisdiction
3 and venue are proper in this Court. Birch Bay Bob's admits that its principal place of business is
4 in the State of Washington and that the individual defendants reside in the State of Washington.
5 Birch Bay Bob's denies the remaining allegations in paragraphs 2.1 though 2.3 of the Complaint,
6 inclusive.

III. PARTIES

8 3.1 Birch Bay Bob's admits that plaintiff is incorporated in the State of Washington
9 and has its principal place of business in Whatcom County, Washington. Birch Bay Bob's denies
10 the remaining allegation contained in paragraph 3.1.

11 3.2 Birch Bay Bob's admits Bob's Burgers and Brew of Washington, LLC (BBB) is a
12 Washington limited liability company, with its principal place of business in Lynden, Washington,
13 and that it operates restaurants in the State of Washington. Birch Bay Bob's denies each and every
14 remaining allegation contained in paragraph 3.2.

15 3.3 Birch Bay Bob's admits that defendants Bob and Rick Kildall are member of BBB.
16 Birch Bay Bob's denies each and every remaining allegation contained in paragraph 3.3.

17 3.4 Birch Bay Bob's admits the allegations in paragraph 3.4

18 3.5 Birch Bay Bob's admits that Cody Hurlburt is a Birch Bay Bob's member. Birch
19 Bay Bob's denies each and every remaining allegation contained in paragraph 3.5.

20 3.6 Birch Bay Bob's admits the allegations in paragraph 3.6.

21 3.7 Birch Bay Bob's lacks information and belief with respect to the allegations in
22 paragraph 3.7 and therefore denies them.

IV. FACTS

24 4.1 Birch Bay Bob's admits that plaintiff manufactures and installs signs. Birch Bay
25 Bob's denies each and every remaining allegation contained in paragraph 4.1.

1 4.2 Birch Bay Bob's admits that plaintiff filed the copyright registrations set out in
2 paragraph 4.2. Birch Bay Bob's denies each and every remaining allegation contained in
3 paragraph 4.2.

4 4.3 Birch Bay Bob's denies each and every allegation contained in paragraph 4.3.

5 4.4 Birch Bay Bob's admits that plaintiff filed the copyright registrations set out in
6 paragraph 4.2. Birch Bay Bob's admits that plaintiff manufactured signs for various Bob's
7 locations. Birch Bay Bob's denies each and every remaining allegation contained in
8 paragraph 4.4.

9 4.5 Answering paragraph 4.5, Birch Bay Bob's lacks information and belief with
10 respect to the allegations regarding transfer agreements but expressly denies that plaintiff has
11 ownership interests or a copyright in the Birch Bay Bob's signs. Birch Bay Bob's denies each and
12 every remaining allegation in paragraph 4.5.

13 4.6 Birch Bay Bob's lacks information or belief with respect to the allegations in
14 paragraph 4.6 and therefore denies them.

15 4.7 Answering paragraph 4.7, Birch Bay Bob's admits that TSP was not awarded the
16 contract for the signage at Birch Bay Bob's, that Birch Bay Bob's operates the Birch Bay
17 restaurant and that CDI was awarded the sign contract contract. Birch Bay Bob's denies the
18 remaining allegations in paragraph 4.7 of the Complaint.

19 4.8 Birch Bay Bob's lacks information and belief with respect to the allegations in
20 paragraph 4.8 and therefore denies them.

21 4.9 Birch Bay Bob's lacks information and belief with respect to the allegations in
22 paragraph 4.9 and therefore denies them.

23 4.10 Birch Bay Bob's lacks information and belief with respect to the allegations in
24 paragraph 4.10 and therefore denies them.

25 4.11 Birch Bay Bob's denies each and every allegation contained in paragraph 4.11.

4.12 Birch Bay Bob's denies that plaintiff has any intellectual property rights in the art work or configuration of any signs, and therefore denies any allegation contained in paragraph 4.12 that plaintiff had any rights to assign to anyone, or that BBB or anyone else needed to obtain plaintiff's approval to use any of the at-issue artwork. In the alternative, to the extent plaintiff has any intellectual property rights in the design or configuration of BBB signage or branding, BBB has an irrevocable implied license in any such works in its franchising. Birch Bay Bob's therefore denies each and every allegation contained in paragraph 4.12.

4.13 Birch Bay Bob's denies each and every allegation contained in paragraph 4.13.

4.14 Birch Bay Bob's denies each and every allegation contained in paragraph 4.14.

4.15 Birch Bay Bob's denies each and every allegation contained in paragraph 4.15.

4.16 Birch Bay Bob's denies each and every allegation contained in paragraph 4.16.

4.17 Birch Bay Bob's denies each and every allegation contained in paragraph 4.17.

V. TSP'S CAUSE OF ACTION – COPYRIGHT INFRINGEMENT

5.1. Birch Bay Bob's restates and incorporates by reference the answers, admissions and denials set out in response to paragraphs 1.1-4.17.

5.2. Birch Bay Bob's denies each and every allegation contained in paragraph 5.2.

5.3. Birch Bay Bob's admits that plaintiff wrongfully registered copyright registrations for various signs relating to BBB. Birch Bay Bob's denies each and every remaining allegation contained in paragraph 5.3.

5.4. Birch Bay Bob's denies that plaintiff has any intellectual property rights in the art work or configuration of any signs, and therefore denies any allegation contained in paragraph 5.4 that plaintiff had any rights to assign to anyone, or that BBB or anyone else needed to obtain plaintiff's approval to use any of the at-issue artwork. In the alternative, to the extent plaintiff has any intellectual property rights in the design or configuration of BBB signage or branding, Birch Bay Bob's has an irrevocable implied license in any such works and Birch Bay Bob's actions have

1 been within the scope of its implied license. Birch Bay Bob's therefore denies each and every
2 allegation contained in paragraph 5.4.

3 5.5. Birch Bay Bob's denies each and every allegation contained in paragraph 5.5.

4 5.6. Birch Bay Bob's denies each and every allegation contained in paragraph 5.6.

5 5.7. Birch Bay Bob's denies each and every allegation contained in paragraph 5.7.

6 5.8. Birch Bay Bob's denies each and every allegation contained in paragraph 5.8.

7 5.9. Birch Bay Bob's admits that plaintiff wrongfully alleged that it had rights in the at-
8 issue artwork. Birch Bay Bob's denies each and every remaining allegation contained in
9 paragraph 5.9.

10 **VI. PLAINTIFF'S PRAYER FOR RELIEF**

11 6.1 Birch Bay Bob's denies that plaintiff is entitled to the relief it seeks;

12 6.2 Birch Bay Bob's denies each and every allegation in Plaintiff's Complaint that
13 Birch Bay Bob's has not expressly addressed.

14 **AFFIRMATIVE DEFENSES**

15 By way of further answer to Plaintiff's Complaint, Birch Bay Bob's alleges the following
16 affirmative defenses:

17 1. Plaintiff has failed to state a claim upon which relief can be granted.

18 3. Plaintiff's claims are barred by the doctrines of waiver.

19 3. Plaintiff's claims are barred under the doctrine of unclean hands.

20 4. Plaintiff's claims are barred as it has committed copyright misuse, inequitable
21 conduct and otherwise abused the copyright process.

22 6. Plaintiff's claims are barred based upon equitable estoppel, waiver, detrimental
23 reliance, release, and other applicable equitable defenses.

24 7. Plaintiff's claims are barred because it has no right, title or interest in any
25 "copyrightable" material, as the at-issue art is utilitarian, constitutes BBB's trademark, is not

1 original nor creative as to plaintiff, and otherwise not subject to any copyright protection in the
2 name of plaintiff.

3 9. Plaintiff's claims are barred because to the extent that the at-issue artwork is
4 subject to copyright protection in the name of plaintiff, as part of its dealings with plaintiff, Birch
5 Bay Bob's is acting within the scope of implied irrevocable licenses to use BBB artwork its brand
6 and trademark and to create derivatives of the at-issue artwork for franchise use without first
7 obtaining the consent of or further compensating plaintiff.

8 10. Plaintiff's claims are barred because to the extent that the at-issue artwork is
9 subject to copyright protection, Defendant Bob's Burger and Brew and/or others were the authors,
10 or at least joint authors, of such work.

11
12 12. Birch Bay Bob's reserves the right to state additional affirmative defenses based
13 upon continuing discovery and investigation.

14 **PRAYER FOR RELIEF**

15 WHEREFORE, Birch Bay Bob's respectfully requests this Court enter judgment in its
16 favor:

- 17 (1) dismissing Plaintiff's Complaint with prejudice;
18 (4) awarding Birch Bay Bob's their attorneys' fees and costs.

1 DATED this 8th day of July, 2010.

2 BETTS, PATTERSON & MINES, P.S.

3
4 By /s Daniel L. Syhre

5 Lawrence Gottlieb, WSBA #20987

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17 Attorneys for Defendants Bob's Burger and

18 Brew of Washington, LLC, Rick Kildall,

19 Cody Hulburt, B3 Birch Bay Bob's, Jeff

20 Roberts Yakima Bob's Burger and Brew,

21 LLC and Bob Kildall

CERTIFICATE OF SERVICE

I, Daniel L. Syhre, hereby certify that on July 8, 2010, I electronically filed the following:

- **Defendants Cody Hulbut And B3 Birch Bay, Llc's Answer To Plaintiff's First Amended Complaint For Copyright Infringement; and**
- **Certificate of Service;**

with the Court using the CM/ECF system which will send notification of such filing to the following:

Counsel for Plaintiff The Sign Post, Inc.:

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DATED this 8th day of July, 2010.

BETTS, PATTERSON & MINES, P.S.

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